SUPREME COURT OF THE UNITED STATES

MICHAEL TERRELL *v.* TERRY L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–7535. Decided October 10, 1989

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

The Court summarily vacates an unpublished per curiam opinion of the Court of Appeals for the Sixth Circuit without indicating that the Sixth Circuit committed legal error or that intervening circumstances require reconsideration of its decision. Because I view this action as an unwarranted use of the Court's resources and an unjustified imposition on the Court of Appeals, I dissent.

As the Court explains, the Sixth Circuit concluded that "the district court properly determined" that Terrell's ineffective assistance claims were procedurally barred. The Court's sole stated reason for vacating that decision is that the Court of Appeals erroneously attributed to the District Court a conclusion it never made. Although the Court of Appeals appears to have been wrong as to the basis of the District Court's ruling, the appellate court's statement unequivocally expresses agreement with the view that the claims were procedurally barred. This, then, is simply a case of an appellate court affirming a district court's dismissal on a legal basis different from that adopted by the district court—a not uncommon practice.

Underlying the Court's summary disposition of this case appears to be an assumption that the Sixth Circuit did not consider the adequacy of the Ohio courts' procedural bar holding. The Court of Appeals, however, had before it and made reference to the Magistrate's report and the District

Court's decision, both of which discussed the issue. It is not our place to vacate a Court of Appeals opinion on the supposition that the court failed to give sufficient thought to its own holding, merely because we would prefer a more extended discussion. Unless the Court is prepared to reverse the Court of Appeals' reliance on procedural bar, there is no basis for setting aside the decision below. This Court has debated the appropriateness of performing an "error-correcting function," *see, e. g., Pennsylvania* v. *Bruder*, —— U. S. ——, 109 S. Ct. 205, 207–208 (1989) (STEVENS, J., dissenting). But I have no doubt that vacation of unpublished lower court opinions without *any* suggestion of error or intervening change in the law is an unwise use both of our resources and of those of the Court of Appeals.